

Unfair contract terms

The advent of the new UCT regime

In November 2023, the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (UCT Act)* came into force. As a consequence, the application of the unfair contract terms (UCT) regime has been expanded to include a far wider range of small business standard form contracts. There is also a new financial penalty framework for breach of the enhanced requirements.

Overview

The *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)* regulates UCTs in financial products and contracts for the supply or possible supply of financial services. The regulation of UCTs in all other contracts for the supply of goods and services is prescribed by the *Australian Consumer Law (ACL)* within the *Competition and Consumer Act 2010 (Cth)*.

Although the fundamental test for determining unfairness has not changed, the UCT Act has introduced significant amendments to the regimes in both the ACL and the ASIC Act.

Key changes

It is now an offence to rely, or purport to apply or rely, on a UCT. A person will also contravene the UCT regime if they make a contract containing an unfair term, but only if they proposed it.

The definition of "small business contract" has been expanded to capture contracts for the supply of goods or services (including insurance) and at least one party to the contract employs fewer than 100 persons and/or the party's turnover, for that party's last income year that ended on or before the contract is made, is less than AUD 10,000,000.

The upfront price payable threshold has been removed entirely from the definition of small business contract under the ACL and increased to AUD 5,000,000 under the ASIC Act.

In addition, a contract may be determined to be a standard form contract despite there being an opportunity for some level of negotiation of terms.

Penalty regime

The penalties for a body corporate for breach of the new framework in the ASIC Act will be the greater of:

- 50,000 penalty units – currently A\$15,650,000;
- three times the value of any benefit obtained, if such an amount can be quantified (unchanged); or
- 10% of the body corporate's annual turnover for the previous 12-months, capped at 2,500,000 penalty units – currently A\$782,500,000.

The Courts will have additional powers to make a wider variety of restorative orders.

Regulatory enforcement

ASIC and the ACCC have both publicly stated that enforcement of the updated UCT legislation will be a key strategic priority for 2023/2024 and beyond.

In 2023, ASIC commenced enforcement action against Auto & General, HCF Life and PayPal Australia, seeking declaratory relief in relation to a range of allegedly unfair terms for alleged breaches of the UCT regime in 2023.

Recommendations

The practical effect of the changes to the UCT regime is that businesses who engage with consumers and small businesses pursuant to standard form contracts will now be exposed to substantial financial penalties for contraventions.

Although many insurers and intermediaries undertook reviews of their standard form insurance contracts when the UCT regime was expanded to insurance contracts in October 2021, the stakes are now much higher and it is clear that the regulators are adopting a heavily interventionist approach to enforcement.

It is critical that insurers and intermediaries continue to review their standard form contractual arrangements to determine whether the enhanced UCT regime applies and, if so, whether such agreements may include any terms that may be at risk of being deemed to be unfair.